

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 804 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.
2. To be referred to the Reporter or not? No.

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3. Whether Their Lordships wish to see the fair copy of the judgement? No.
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.
5. Whether it is to be circulated to the Civil Judge? No.

SHANKARBHAI S PARMAR

Versus

STATE OF GUJARAT

Appearance:

MR. G. RAMKRISHNAN for MS RV ACHARYA for appellant
MR. ND GOHIL, A.P.P., for the respondent.

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 11/02/98

ORAL JUDGEMENT

The appellant herein has brought under challenge his conviction and sentence for the offence punishable u/s 20 (b) (i) of the Narcotic Drugs and Psychotropic Substances Act, 1985, (NDPS Act, for short) rendered by the learned Sessions Judge, Sabarkantha at Himmatnagar as her impugned judgment and order dated 20th July, 1994

in Narcotic Case No.2 of 1993.

2. The appellant has been sentenced to rigorous imprisonment for a period of five years and fine of Rs.50,000/- in default rigorous imprisonment for six months.

3. The facts of the prosecution case may briefly be referred to from the impugned judgment :

At about 4-00 O'clock in the afternoon on 18th October, 1993 P.S.I. H.M. Parmar who was in the company of members of his prohibition staff at the check post near three roads of Motipura, Himmatnagar received the information that one person from Rajasthan who had put on muffler of blue colour with white dots was to arrive at S.T. Bus Stand of Himmatnagar with one tin bag and one shoulder bag containing "Ganja". Coincidentally Police Inspector of Himmatnagar town was proceeding from three roads of Motipura. P.S.I. Mr. Parmar informed the Police Inspector about the information which he received. The procedure was immediately followed inasmuch as panchas were called and they were made to understand about the information received by the Police Sub-Inspector and after having preliminary panchanama at about 4-15 O'clock in the afternoon the police personnel and the panchas reached Himmatnagar Bus Stand in the government vehicle. They found one person having shoulder bag on his shoulder and with tin bag covered between his legs sitting on the bench outside the parcel office of S.T. Bus Stand. Seeing the police the person was about to move but the police stopped him and inquired about his name and address. Upon such inquiry he informed that he was Shankerbhai Sanjabhai Parmar, a tribal, residing at Kanbaifala, Madanpura, Tal. Kherwada. Thereupon, search of shoulder bag was made and it was found that there was material of leaves and dust of leaves which upon smelling revealed to be "Ganja". Upon opening the tin bag similar material was found therefrom. Upon being asked whether the person had any pass or permit the accused informed that he did not have any pass or permit in respect of the material. Thereupon, one Ramchandra Ashavmal Sindhi was called upon from nearby place for the purpose of weighment of the material. The material weighed 1.650 gms. of "Ganja" so far as the same was contained in the shoulder bag and it weighed 2.600 gms. of Ganja as contained in the tin bag. In all, the material was found to be 4.250 gms. of "Ganja" valuing Rs. 4,250/-. Samples of 0.100 gm. each from the material found from the shoulder bag and the tin bag were taken in plastic bags in presence of two panchas

and Police Inspector. Necessary slips signed by the panchas and Police Inspector were placed in such samples which were sealed. "Ganja" found from the shoulder bag and "Ganja" found from the tin bag were seized with the respective containers and panchanama to that effect was made. All that happened during the period between 4-15 p.m. to 6-00 p.m. In the evening P.S.I. H.M. Parmar thereafter gave complaint against the accused. Upon completion of investigation the charge-sheet was filed and the matter went before the learned Sessions Judge. Charge exh. 7 was framed against the accused who pleaded not guilty to the charge. Evidence thereupon was recorded before the learned Sessions Judge. After conclusion of the evidence, the accused's statement u/s 313 of the Cri. Pro. Code 1973 (Act II 1974) was recorded. Learned Sessions Judge heard the submissions made by the learned advocate appearing on behalf of the accused and the learned A.P.P. who represented the State. She thereafter recorded conviction and sentence of the accused, as aforesaid. That is how the accused is before this Court by way of the present appeal.

4. I have heard learned advocate for the appellant and learned A.P.P. for the respondent - State.

5. Mr. G. Ramkrishnan has read the oral evidence adduced before the learned Sessions Judge for the purpose of showing several discrepancies in the oral evidence of the witnesses. He has first referred to pancha witness Madanji Genaji Bhat p.w. 1 exh. 10 for submitting that this witness has not supported the prosecution in material respect, and more particularly this witness has not spoken about the presence of the Police Inspector. It is not in dispute that Police Inspector alleged to have remained present all throughout the proceedings of search and seizure has been a gazetted officer. It is also not in dispute that he is examined as p.w. 6 exh. 25 for supporting the prosecution case that he was all throughout present during search and seizure, as aforesaid. The fact that he was present at the relevant point of time finds support from the evidence of Hirabhai Muljibhai Parmar p.w. 8 exh. 30.

3. Therefore, it may be said at the outset that simply because the reference with regard to presence of Police Inspector does not find its place in the evidence of pancha witness it cannot be said that the prosecution story about presence of Police Inspector at the relevant point of time becomes doubtful. It may be noted that the signature appears in all the relevant documents including

panchanama exh. 15, seizure of muddamal "Ganja" as also the slips in the muddamal articles. With this salient feature of the prosecution case the evidence of pancha witness Madanji Genaji Bhat might be referred to. He has testified that he and other panchas were summoned at about 4-15 O'clock in the afternoon on 18th October, 1993. They were called near Jagdish Automobile opposite Motipura bus stand and were informed that the police had received information with regard to "Ganja" being brought in a particular manner at the bus stand and that they were required to remain as panchas. The description of the person who was to bring "Ganja" was narrated to the panchas. In the preliminary panchanama to that effect the panchas had signed. Thereafter, they had gone from Motipura bus stand to Himmatnagar bus stand in the government vehicle "jeep". After the jeep was parked they had gone into the compound of S.T. bus stand. They had first gone to platform no. 1 where the parcel office is located. They found one person sitting on the bench with shoulder bag on his shoulder and tin bag lying between his legs. When he was about to stand up, P.S.I. Parmar had stopped him. Upon his name and address having been asked he had supplied the same. Thereafter P.S.I. Parmar had opened the shoulder bag and found some material covered in a green colour cloth. Upon opening the said cover dry "Ganja" in the form of green leaves was found. Upon smelling the material they found that it was "Ganja". Thereafter, tin bag was also opened and similar material was found covered in the supplement of Sandesh news paper. One Sindhi was called and he arrived with measurement and weight and upon weighing the material it was found to be 1.650 gm. as contained in the shoulder bag inner cover as aforesaid and 2.600 gms as contained in the tin bag. Thereafter, two plastic bags were brought and 0.100 gm. each of the materials was taken out from tin bag and inner cover of the shoulder bag for the purpose of sample and placed inside the plastic bag after the same were weighed. After the "Ganja" materials were weighed to be 0.100 gm. each, slips which were to be placed inside the plastic bag were signed by the panchas and the plastic bags were kept by Police Inspector with him and the tin bag and the plastic bag were sealed in presence of the panchas and they were sealed. The plastic bags weighing 0.100 gm. each were placed in a brown colour paper cover and the brown colour paper cover was sealed. The samples as well as seized bag were sealed after placing necessary slips inside, as aforesaid. The panchanama with regard to search and seizure, as aforesaid, was prepared, read over to the panchas and the panchas had signed. The pancha witnesses have identified his signatures as well as the accused and

the muddamal articles.

4. Commenting upon the evidence of the pancha witness it has been submitted by Mr. Ramkrishnan that the witness has in his cross-examination admitted that the preliminary panchanama was ready when his signature was obtained. In my opinion, nothing turns on this because the witness has deposed that he and another pancha witness had been informed about the information received by P.S.I. and about recording of that part of incident in the panchanama of seizure. It is possible that the panchas might have been made aware of the information and simultaneously the panchanama might have been made ready for signature of the panchas. In my opinion nothing turns on this admission. As stated above, absence of mention with regard to presence of Police Inspector does not adversely affect the prosecution case inasmuch as presence of the Police Inspector has been referred to in all the respective pieces of evidence, as noted above. It has been submitted that there is mention about brown paper cover in so far as preparation of the sample was concerned, whereas that part with regard to the brown paper cover is missing in the evidence of other witness. That is also a minor discrepancy, if at all the same can be said to be a discrepancy in the prosecution evidence. Then there is a submission to the effect that nothing except the name and address was asked by the police to the accused. Here also nothing turns on the material portion of the evidence of the pancha witness. Thus, the pancha witness supports the prosecution story in all material respects.

5. It is no doubt true that Ramchandra Asavmal Sindhi p.w. 7 exh. 27 has turned hostile. But even this witness was called there for the purpose of weighing the offending material and he could not escape saying that he in fact had an occasion of weighing the material though not at the scene of offence but at the police station. He has not disputed the fact that he was carrying on business of selling fruits near the tower at Himmatnagar by keeping four wheeler. This fact would go to support the prosecution story that he was called from nearby the S.T. bus stand. His statement before the police has been confronted to him and has been proved in the evidence of the Investigating Officer, Hirabhai Muljibhai Parmar. On the contrary, difference between weight of the material in each of the plastic bags as weighed by the witness and as weighed in the Forensic Science Laboratory (F.S.L. for short) might be explained from the fact that measurement which this hostile witness was having might not be of required

standard. Reference has been made to the oral evidence of p.w. 2 Ganpatsinh Kesarisinh exh. 16 and p.w. 3 Rameshbhai Nathabhai exh. 17, who are the persons of police staff. Except some minor discrepancies nothing could be traced out from the evidence of these two witnesses. In fact, these witnesses substantially support the prosecution story. It may be noted that the discrepancies which have been referred to from the evidence of these two witnesses is with regard to time of 4-00 and 4-15 in the afternoon when the information was received and procedure for reaching the accused was commenced. The other discrepancy which has been referred to from the evidence of this witness as also other witness is with regard to the people having collected at the scene of offence and some act of dispersing them having been performed. Connected with this discrepancy is the discrepancy with regard to the presence of the officers of parcel office nearby which office the offence was noticed, as aforesaid. In my opinion, nothing turns of these discrepancies inasmuch as some witnesses might have noticed the collection of the people whereas the other witnesses might have noticed the police act of dispersing the people. It is possible that the officers might have come out from the parcel office and again might have gone inside the parcel office. It is also possible that the people might have collected whereas the officials searching the accused might have required them to be dispersed in order that process of search and seizure might not get disturbed. That is how, this discrepancy will not adversely affect the prosecution story and will also not prejudice the accused. As stated above, panchanama exh. 15, F.S.L. Report exh. 33, complaint exh. 31, seizure of muddamal and the slips in the muddamal articles showing the signature of the panchas and the Police Inspector do lend support to the prosecution case. Besides, inspite of the fact that the police officers have been examined with regard to keeping of the muddamal articles and the samples before they were sent for examination by the experts of F.S.L., F.S.L.'s report clearly indicates that the seals on the muddamal articles have remained intact and they have not been disturbed in any manner. In that view of the matter, the discrepancies with regard to keeping of the samples for sometime with the concerned police officials will not adversely affect the prosecution story and will also not prejudice the accused if totality of the facts and circumstances of the case are borne in mind.

6. That being the state of prosecution evidence conviction of the accused under the relevant provisions of the NDPS Act will have to be upheld. However,

reference might be made to a couple of decisions cited by Mr. Ramkrishnan in respect of his submission that in view of the discrepancies in the prosecution evidence there is violation of Section 42 (2) and Sec. 50 of the NDPS Act. As stated above, the facts of the present case clearly indicate that P.S.I. Parmar had immediately sent wireless message to his superior officer and exh. 32 is the copy of the said wireless message. It cannot also be disputed that the information was received in such a manner and at such a point of time that it would require immediate action into the matter and the police did act with the required speed so as to locate and notice the offending material in possession of the accused. It has also come in the evidence that the Police Inspector who was the Gazetted Officer also accompanied Police Sub-Inspector Parmar right from the beginning till the search and seizure were effected. It also cannot be disputed that the accused was produced before the concerned Magistrate on the next day i.e. on 19th October, 1993 within 24 hours of his arrest. Bearing in mind all these facts appearing from the material placed before the learned Sessions Judge, the decisions cited by Mr. G. Ramkrishnan might be considered. He first referred to the decision in the case of Sukhpal Singh Pala Vs. State of Rajasthan, reported in 1996 (3) CRIMES 194. In that case, the provision of Section 50 of the NDPS Act, was invoked inasmuch as the officer conducting search did not offer to the accused option of he being searched before the Gazetted Officer. Reference has been made to the decision of the Apex Court in the case of State of Punjab Vs. Balbir Singh reported in JT 1994 (2) SC 108. Now, there can be no dispute with regard to the provision of Section 50 being mandatory as held in Balbir Singh (supra). However, a Division Bench of the High Court of Gujarat considering the decision of the Supreme Court in the case of Balbir Singh (supra) has held that if the Gazetted Officer himself was present at the time of search, it would not be necessary to inform the accused whether he wanted to have himself searched before the Gazetted Officer. (See, D.B. Thakur Vs. State, reported in 37-1 (1996-1) G.L.R. 219 and the decision rendered by another Division Bench in the case of Mahmudkhan Rasulkhan Pathan Vs. State of Gujarat in Criminal Appeal No. 169 of 1991 decided on 22nd December, 1997.) Hence, the ratio in the case of Sukhpal Singh's case @ Pala's case (supra) laid down by the learned Single Judge of Rajasthan High Court cannot be made applicable in this case.

7. Another decision referred to by the learned advocate for the appellant is also delivered by a learned

Single Judge of Delhi High Court in the case of Jacob Lawns Vs. State, reported in the same Volume at Page No. 223. It has been submitted that noncompliance of the provision of Section 42 and 57 which would be mandatory would result in vitiating the prosecution case. On a reference being made to the facts of the present case as stated above, the decision will have no application.

8. As a matter of fact, effect of violation of even mandatory provision of the NDPS Act has now been considered by the Apex Court, in the case of State of H.P. Vs. Pirthi Chand And Another, reported in 1996 Supreme Court Cases (Cri.) 210. The Apex Court while considering the provisions of Section 50 of the NDPS Act, held that although requirement on the part of the searching officer to inform the accused of his right to choose to be searched in the presence of a Gazetted Officer or Magistrate is mandatory, evidence obtained as a result of search and seizure in violation of mandatory requirement of the action does not become inadmissible. It has also been held that weight to be attached to such evidence depends on facts and circumstances of each case.

9. In that view of the matter, the submissions made by Mr. G. Ramkrishnan for the appellant against the appellant's conviction cannot be accepted. Hence, appellant's conviction u/s 20 (B) (1) of the NDPS Act, will stand confirmed.

10. I have heard the learned advocate appearing for the appellant and learned A.P.P. for the State -respondent on the question of sentence. It is not in dispute that the appellant herein is illiterate person. It is not made clear from the prosecution case that the accused was dealing in offending material by himself or whether he was merely acting as a carrier. It is also not in dispute that he belongs to scheduled tribe/caste or backward class. Bearing in mind the facts and circumstances of the case as well as the undisputed facts as aforesaid, I am of the opinion that five years sentence which is imposed under the aforesaid provisions of the NDPS Act is on higher side. The provision in question speaks about sentence which may extend to five years and it does not speak about minimum sentence. The accused was apprehended immediately after he was searched. He has thereafter remained in the custody during pendency of the trial. He spent in jail a period of more than four years.

11. In view of what is stated above, his substantive as well as default sentence will stand reduced to one

undergone. However, his sentence of fine will stand confirmed. Thus, the accused will therefore be immediately set at liberty, if not required for any other purpose or case. This appeal will stand partly allowed on the question of sentence, as aforesaid said.

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